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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 374

DARWYN GALLUP,

Appellant,

vs.

TOWNSHIP OF LOWER MERION

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

The statutory provision believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, as amended on May 22, 1939, as there is drawn in question the validity of an Ordinance of a Township and a statute of a State on the ground of their being repugnant to the 14th Amendment of the U. S. Constitution. This said section of the Judicial Code is to be found on page 3 of the Appendix of the Rules of this Court.

Herein is involved the validity, construction, exercise and application of a Building Code Ordinance of November

15, 1939 of the Lower Merion Township of the State of Pennsylvania, which Ordinance is to be found under the reenacted Lower Merion Building Code of 1941, page 21. It is listed under Article II, Sec. 200, Definitions, and is as follows:

> "HOUSE TRAILER means any vehicle used for living or sleeping purposes. If a house trailer is used for living or sleeping purposes within the Township for an aggregate of more than thirty days in any period of one year, it shall be considered as a single-family dwelling for all purposes of this ordinance."

Also to be considered is another definition under the said Sec. 200, to wit:

> "SINGLE-FAMILY DWELLING means a building designed for and occupied exclusively as a residence for only one family."

which is found on page 22 of this said Code.

Also to be considered is Sec. 105.3 of the said Code which is found on page 15 thereof and reads as follows:

> "105.3 EXISTING BUILDINGS. Nothing in this ordinance shall prevent the continuance of the use and occupancy of a lawfully existing building except as may be necessary for the safety of life or property • • •."

Also to be considered is the First Class Township Code, as amended by the Act of April 29, 1925, of Pennsylvania, 53 P. S. 19092-1502, Clause XVIII (same as Act of 1931, P. L. 1206, Sec. 1502, XVIII):

> "BUILDING REGULATIONS: To make regulations for the construction of new buildings and the alteration and repair of old ones, and to require that before the work begins municipal approval of the plans and specifications therefor be secured; to classify buildings or parts

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of buildings according to the use to be made of them; to specify the mode of construction of such different classes of buildings; and to require that before any use of occupancy be changed from any classification to a different classification, as to which more stringent regulations are prescribed under the provisions of any ordinance relating thereto, municipal approval of the plans and specifications therefor be secured."

The date of the judgment or decree sought to be reviewed is April 8, 1946, which was the judgment of the Supreme Court of Pennsylvania refusing a petition for the allowance of an appeal from an order and opinion of the Superior Court of Pennsylvania filed March 5, 1946. The date of the filing of the herein petition is July 8, 1946.

The nature of the case comprises the issues presented by the application or exercise in 1942 by a Township of its Building Code Ordinance of 1939 dealing with the use and occupancy of house trailers to the petitioner, an individual who had been conducting a house trailer camp lawfully since 1936. It is alleged that here was a vested property right with which the State through the Township could not interfere; that a Building Code having to do with proper design of new buildings has no application to the control of the use of buildings after completion and continued same lawful use, and certainly no application to house trailers which are defined as vehicles and not as buildings; that such Building Code provision so exercised is not a regulation but a confiscation of property; that such Ordinance, even if valid, cannot be exercised against the appellant in the instant case, where the evidence is not that such use is or has been against the morals, safety and health of the community, but on the contrary that it has an A-1 rating for sanitation and health, and that there has never been any complaint from the police or any other source as to its past use and occupancy; and finally, that

house trailers or vehicles cannot be classified with buildings as single-family dwellings, as not being contemplated by the relevant State Statute.

Nature of Case and Rulings

Darwyn Gallup, the Appellant, has occupied #305 East Lancaster Avenue, Lower Merion Township, Montgomery County, the buildings thereon, and the parking space adjacent thereto as a trailer camp known as "Quaker Lodge" since the year 1936.

These premises consist of a tract of approximately two hundred feet (200') square, fronting on Lancaster Avenue and abutting the right of way of the Pennsylvania Railroad Company in the rear.

A large dwelling house is located approximately in the center of the front half of this lot, and to the rear of this building is a lodge, a small building, equipped as a community house. In a large room on the first floor were located washing and toilet facilities for men, and on the second floor similar accommodations were furnished for women. Some laundry facilities were likewise furnished therein. All trailer occupants had access to these buildings. A driveway with two entrances from Lancaster Avenue circles the dwelling house. Along the easternmost and westernmost boundaries of the lot and fronting on said driveways are rows of house trailers laid out in accordance with the Township's directions.

In summer the water was furnished to the trailers by pipe lines leading from the dwelling house; in winter the water was obtained from either the dwelling or from the community house. Electricity was available to the individual trailers by circuits near them and which extended from the dwelling house.

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Each trailer was furnished a garbage can, the refuse from which was deposited from time to time at a central collecting plant to the rear of the community house, where it was regularly picked up. Trash was either burned or disposed of in a similar manner.

The average trailer on the site was approximately twenty-five feet (25′) in length and eight feet (8′) wide, with windows about eighteen inches (18″) square. The approximate height from the floor to ceiling was five and one-half feet (5½′). Each had one room, modernly equipped for use as a home, with the exception of toilet facilities. Heat was supplied by coal, gas or oil, as were cooking arrangements in some trailers.

During the period of this occupancy of the premises, Appellant rented out space to people who came there with trailers. Space for a single night was 75¢, for a month the charge was $10.00.

On all occasions the majority of the trailers were occupied, a few by transient tourists, the other by more or less "permanent" residents. At least six (6) of the trailers were occupied by the same individuals who tenanted them for a period of about three (3) or more months, as shown by inspections during the period from July 26, 1942, to October 19, 1942. Some were owned by the Appellant, others by the tenants. The tenants were for the most part defense workers. Appellant also had a number of trailers for sale. Neither Appellant nor his family occupied any of these trailers at any time.

The entire establishment was operated by the Appellant in an orderly, sanitary manner, and no complaint whatever was made as to the manner of its operation. The Township health and police officials made frequent inspections, and based thereon made favorable reports on the very sanitary and orderly manner in which the Camp was

conducted. It had an "A-1" rating under health and sanitation. It was manifest from the record that there was no impairment of the safety, morals or health of the community by reason of the maintenance of the trailer camp as conducted by Appellant from and after 1936, and that there were no complaints whatever.

During all this time, to wit, from 1936 to 1942, the Township had both Zoning and Building Code Ordinances. The Zoning Ordinance was that of 1927, which made no references to house trailers or trailer camps until the 19th day of April 1939, when the said Zoning Ordinance was amended, to include, under definitions, the following:

> "*House Trailer* means any vehicle used for living or sleeping purposes. If a house trailer is used for living or sleeping purposes within the Township for an aggregate of more than thirty (30) days in any period of one year, for all purposes of this Ordinance." (Italics supplied.)

This Zoning Ordinance provided for a Board of Adjustment which had the power to grant variances and other exceptions to the provisions therein (Art. XIV), included a definition for Trailer Camps, and it also contained a section (1609) authorizing nonconforming uses of buildings existing at the effective date of the Ordinance.

The Building Code was that of 1930 which likewise made no mention of house trailers or trailer camps, until the 15th day of November, 1939, when the Lower Merion Township adopted its Ordinance No. 664 as an amendment to the said building code by adding the same definitions quoted above for the Zoning Ordinance amendment. With this amendment, the said Building Code was re-enacted in 1941 as the Building Code of 1941.

This Building Code provided for a Superintendent of Building Inspection to enforce the provisions of the ordi-

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nance (Sec. 101.1), did not include a definition for Trailer Camps, and it also contained a section (105.3) as to existing buildings which provided that "nothing in this ordinance shall prevent the continuance of the use and occupancy of a lawfully existing building except as may be necessary for the safety of life and property." Its definition for a single-family dwelling is that it "means a *building* designed • • • for only one family."

The Appellant first had his difficulties under the Zoning Ordinance. After some negotiations thereon, C. E. Rahn, as Supt. of Bldg. Inspection under the Building Code (C. E. Rahn was the Superintendent of Building Inspection under the Zoning Ordinance as well as the Building Code) under date of October 26, 1939, wrote to the Appellant as follows:

> "Herewith we hand you plans showing proposed layout for your trailer camp for those trailers that remain more than thirty days • • •
> *If you lay out spaces as outlined on this plan, we think it will meet the requirements of the Zoning Ordinance.*" (Italics supplied.)

Despite the Appellant's apparent full compliance with this order, there were further notices as to "variances" with the said Zoning Ordinance of 1939. It might well be argued here that having accepted the order of the Township there was a contract between Appellant and the Township; that any further prosecution of Appellant by the Township was an impairment of the contract rights of Appellant, against due process. *New Orleans Gas Co.* v. *La. Light Co.*, 115 U. S. 650, 671. The Appellant, neverthless, applied for extension of these "variances" from time to time; and finally the Board of Adjustment took the following final action on June 25, 1942:

> "Extension of variance declined because from the testimony offered, it now appears that the use of the

property #305 East Lancaster Avenue as a Trailer Camp is a non-conforming use and *not* violative of the Ordinance."

That is, because this use existed since 1936 and at the time of the enactment of the Ordinance in 1939, it was a non-conforming use under section 1609 and no need existed for filing any further applications for extension of variance because it was not an issue of variance. Under the said section 1609 there should, of course, never have been any prosecution of Appellant. But that did not and would not deter the Township. What finally appears to have made the Township recognize section 1609 was that it was impossible to force the Zoning ordinance of 1927, as amended, because the Appellant's property was both residential and commercial. If occupied over thirty days, it was residential; under thirty days, commercial. As the attorney for the Township explained (p. 20a of Record), "there had been a question arising under the Zoning Code, and this property was in a C-1 classification, where there could not be any trailers. Under C-2, they could come in under exceptions."

On July 13, 1942, less than three weeks later, the Appellant was notified in writing by the same said Superintendent of Building Inspection that the Committee on Building Regulations had decided that the (re-enacted) Building Code of 1941, with the said amendment in respect to house trailers, must now be adhered to; and that as the trailers which had been on Appellant's premises for more than thirty days failed to conform with the building code in various specific respects, it would be necessary for the Appellant to remove them. The specific respects were as to access to dwellings, as to minimum area of dwellings, as to rooms or habitable rooms of dwellings, and as to windows. In respect to habitable rooms of dwellings, for in-

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stance, the minimum clear ceiling height designated was 7′ 6″, obviously a height to which it was impossible for house trailers to conform.

In addition to the notice of July 14, 1942, the Appellant was, on November 30, 1942, served with a summons in assumpsit for the recovery of the penalty provided for in the Building Code, which along with some other of its provisions are given below. The charges were the same as included in July 13, 1942 notice. In 1943 Appellant purchased the entire property which he had theretofore merely leased.

On December 7, 1942, hearing was held on the said summons and the Justice of the Peace convicted the Appellant as guilty of violating the said Code, which judgment was publicly given in favor of the Township in the sum of $25.00, costs and interest. On December 26, 1942, the Appellant filed his appeal, which was allowed by the Honorable William F. Dannehower, Judge, conditional upon the Appellant filing a bond with surety in the sum of $100.00 conditioned for the payment of the fine and costs, if unpaid. The matter then came up before his Honor, Harold G. Knight, President Judge, as the result of an agreement for the trial by the court without a jury under the Act of 1874, April 22, P. L. 109.

As a result of this trial, Judge Knight found, on June 15, 1944, that the Lower Merion Building Code of 1941, as it pertains to the use and occupancy of house trailers, is reasonable and valid; that Appellant has violated the provisions of said building code; and that Appellant is entitled to a verdict in its favor in the amount of the fine or penalty provided therein.

Judge Knight found the 1939 amendment to the Building Code "nothing more than a prohibition against the use of a house trailer for living or sleeping purposes for more

than thirty days in a year, for it is perfectly obvious that trailers, as we know them today, could not possibly conform to all requirements for dwellings, especially with respect to area and window space." Yet he could not see where this is confiscation rather than regulation. He could not see that such regulation, if it be, pertained to "buildings" and not "vehicles."

He admits that "The avowed purpose of the Building Code is to 'provide minimum standards, provisions and requirements for safe and stable design, methods of construction and uses of materials in buildings.'" Yet he does not recognize that here was no question of design for construction or alteration, within the Pennsylvania authority as given to this Township (the First Class Township Code, 53 P. S. 19092-1502, Clause XVIII), but rather use and occupation, which was not included in this authority, which authority states, "To make regulations for the construction of new buildings and the alteration and repair of old ones, and to require that before the work begins municipal approval of the plans and specifications therefor be secured; to classify buildings or parts of buildings according to the use *to be* made of them; to specify the mode of construction of such different classes of *buildings;* and to require that before any use or occupancy be *changed* from any classification to a different classification, as to which more stringent regulations are prescribed under the provisions of any ordinance relating thereto, municipal approval of the plans and specifications therefor be secured." Judge Knight could not therefore see that such ordinance in including and exercising a purpose *ultra vires* to its authority was void.

Judge Knight did not consider at all the question of nonconforming use, as exercised with reference to the Zoning Ordinance, and its equivalent, a preexisting property under

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the Building Code, section 105.3—he appeared to consider this non-conforming issue as one of variance, instead; nor the taking away of substantial vested property without due process of law. Neither did Judge Knight consider the unreasonable exercise of this valid ordinance under the facts of this case showing no actual interference with health, safety, morals or general welfare. On the contrary, he held that if the ordinance does "these things," *i. e.*, profess to provide for the health, safety, morals or general welfare, then it is reasonable and valid.

Exceptions were filed to the said findings but they were dismissed under date of October 5, 1944. The matter then came up by appeal to the Superior Court of Pennsylvania. The Court, on March 5, 1946, affirmed the ruling of the Court of Common Pleas.

In the Superior Court opinion, it was, first, held that later legislation supplied the right to townships to make building regulations not irrespective of use. That was not the point argued. In behalf of the Appellant, it was argued that the township could not regulate the use after construction. Of course, for purposes of having any sensible building regulations, they must be based on a classification of *buildings* according to the use *to be* made of them. That Superior Court holding has no relevancy either to the argument made or the facts of the case.

The Superior Court then holds:

> "The validity of the *original* Building Code of 1931 is not challenged by the appellant as being invalid or unreasonable in any particular. It is a clear violation of this ordinance to build and use as a dwelling a non-conforming house such as, for instance, the familiar tourist camp cabin. It is no less a violation where the cabin is built without, and then moved into, the Township and occupied as a dwelling."

We can only assume that the Court thus uses language very loosely. A non-conforming use is one which must be tolerated under the Zoning Ordinance, and must also be tolerated under the Building Code if of preexisting use, unless such use is shown to actually interfere with the health, safety, morals or general welfare of the Community. Witness the many "tourist camp" cabins and other buildings used as dwellings that existed in this Township prior to the enactment of this or any other building code and yet could not be disturbed because they were preexisting and lawfully vested property and not adversely affecting the health, safety, morals or general welfare.

The Court then errs in referring to the Building Code amendment of November 15, 1939 as one which was passed in "1940". It passes over its own comment that these trailers had been used for dwelling purposes for several years prior to the said amendment without touching on the constitutional questions therein involved. It finds facts which were never even considered by the trial judge's findings of fact, as when it holds that the trailers "were *not* resting on wheels". Thus the Court finds also that "To say these were not dwelling houses is an attempt to fictionalize a reality", although this question was never at any time argued, or considered pertinent to any issue in this case.

The Superior Court next considers that the 1939 amendment which makes a house trailer a "vehicle" and thus a part of a "trailer" camp for the first thirty days of its use, and a "dwelling" only after thirty days' use, even though the Court just considered such Trailers "dwellings" at all times irrespective of use or length of use. And that such is a fair "standard" and "therefore legal".

The Court next considers various House Trailer Camp Ordinances, *not* Building Codes, which had 30, 60 and 90

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day limitations, and considered reasonable *regulatory* ordinances. While this is not the question here and the Court states that it is of first impression in Pennsylvania, the Court holds that the case is controlled by the "principle of local government having the right to exercise all powers conferred". We simply state to that that the Township did not "exercise" properly an ordinance which embodied a power not "conferred".

The Court then states, "It is argued that a current house shortage ought to make this restriction void". To this it can be said that at no time, neither in briefs of record nor at oral argument before the Court was this subject matter raised in any manner. If this is a begrudging way in which to take judicial notice of the house shortage, it is similiar to the guise this Court assumes in finishing its opinion by self reverence not to legislate but rather merely to adjudge.

What was said of Judge Knight's failure to consider and adjudicate the constitutional questions involved equally applies to the Superior Court.

On April 8, 1946, the Supreme Court of Pennsylvania refused a petition for the allowance of an appeal to that Court. No opinion, other than this disallowance, was filed.

That the questions involved are substantial, is not only to be realized from the Appellant's loss of rights and privileges, but from the facts that the Appellant gained his income through the rentals received from the occupancy of these house trailers; that he owned a number of these house trailers and could no longer use them in his business; and finally, that he purchased the entire property on which was located this trailer park in June of 1942, at about the time when he was led to believe he was not infringing upon any Ordinance and just before a summons was served upon him.

The constitutional questions of due process herein submitted were raised in the initial stages of the prosecution and trial as is evidenced from the opinion of Judge Knight, the presiding Judge at the trial of this case is the first Court of Record, as will be found on page 55a of the Appellant's Record as submitted in the Superior Court of Pennsylvania. They were all again raised in the Brief for the Appellant as submitted to the Superior Court of Pennsylvania. They were again raised in the petition for leave to appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania. Neither the trial Court through the said Judge Knight, in his opinion which is to be found on pages 47a and 64a of this Appellant's Record as submitted to the Superior Court, not the Superior Court in its opinion, which is attached, passed upon the taking of property without due process or the exercise of the police power as applied to the facts of the particular case herein. Both the trial Court and Superior Court opinions merely passed on the question of the reasonableness of the thirty day limit for use and occupancy of a house trailer and the right of the Township to enact such ordinance. In addition, the Superior Court has ruled that the clause of the State Act which provides for classification of buildings according to the use "to be" made of them for purpose of passing upon proper design of buildings to be constructed or altered, meant the right to regulate the use and occupancy of house trailers, as here established and in operation for a number of years. The Supreme Court filed no opinion.

Summarily, the Appellant claims that the Superior Court of Pennsylvania erred in the following respects:

1. In ruling that prosecution in 1942 on an Ordinance of 1939 could apply to petitioner's conduct of maintaining house trailers upon his property, which ruling in effect

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would prevent his continuance of a hitherto lawful enterprise, so conducted since 1936, and thus amount to confiscation, against the United States Constitution as well as against Section 105.3 of said ordinance.

2. In applying to house trailers a building code relating to "Buildings", the requirements of which have obviously no rational and reasonable relation to trailers or "vehicles".

3. In holding that the Ordinance as applied to petitioner was valid as an exercise of police power, when upon the record it is definitely proved by the Appellant and admitted on part of the Township that Appellant's conduct of the trailer camp from 1936 to 1942 in no way harmed the morals, health or safety of the community.

4. In failing to consider and rule upon the constitutional questions submitted, as the taking of property, abridging the privileges or immunities, not giving the equal protection of the laws, all under the 14th Amendment to the Constitution of the United States.

Taking Property Without Due Process

The first question presented is:

Does the prosecution on a Building Code against further use of house trailers in 1942, by a Township which passed the Building Code Ordinance in 1939 defining a house trailer as meaning a vehicle used for living or sleeping purposes and providing that if such house trailer is used for living or sleeping purposes for an aggregate of more than thirty days in any year that it shall be considered as a single-family dwelling for all purposes of the Building Code, against an individual who lawfully conducted a trailer camp of house trailers on his own property from and after 1936, amount to a taking of vested property without due process of law?

The answer would appear to be Yes even allowing the Building Code to be valid in every respect and allowing house trailers to be regarded as "buildings' classified as single family dwellings. The interesting fact here is that none of the State courts took any notice of Section 105.3 on pre-existing uses in existing buildings. Nor was the limitation, to make regulations for the erection of "new buildings" or alteration of old ones, imposed by the State Authorizing Act, given any attention. While it has been argued in behalf of Appellant that there is no difference between the allowing of the continued same use of pre-existing buildings in Building Codes and the continued non-conforming use in zoning ordinances, neither the courts nor the Township have taken notice of it.

Therefore, considering the interpretations given to these provisions, as cited, of the said Building Code, it must be held that there was a taking of property without due process.

Penna. Coal Co. v. *Mahon*, 260 U. S. 393;
Tiedeman State and Federal Control of Persons and Property Sec. 143;
Pumpelly v. *Green Bay Co.*, 13 Wall. 166.

Proper Exercise or Application of Police Power

The second question presented is:

Is it a proper exercise or application of police power to so prosecute where admittedly such individual has so conducted the use of house trailers without any record of any danger to the health, safety or morals of the community or threat thereof since 1936?

The general principles concerning exercise of police power through Zoning Ordinances are well stated in *Ambler Realty Co.* v. *Euclid*, 272 U. S. 365. They are equally applicable to Building Codes. *Commonwealth* v.

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Devlin, 305 Pa. 440. There must be a real relation between the purposes and their accomplishment. In *White's Appeal*, 287 Pa. 259, set-back provisions were held not directly bearing on public health, safety and morals. In *Brookdale Homes* v. *Johnson* 123 N. T. L. 602, a minimum height of a roof ridge was likewise so regarded. In *Senefsky* v. *Lawler*, 307 Mich. 728, a minimum floor space was likewise so regarded. And likewise, in *Pringle* v. *Shevnack*, 309 Mich. 179.

Can it even be said it was a bona fide exercise of police power? Here the same house trailer is not a building used as a single-family dwelling forever and ever, as long as there is no aggregate use of 30 days in any one year; but after such use for years, should it pass the 30-day limit, then it becomes a single-family building. At no time, before or after such use, could it conceivably pass any of the specifications for a single-family dwelling. It is therefore an unlawful structure at all times and should not be tolerated even of "Transients." This is not a case of a spade being called a spade, nor applying the definition of a spade to a spade.

Loan Assn. v. *Topeka*, 20 Wall. 655;
Dobbins v. *Los Angeles*, 195 U. S. 223;
Lawton v. *Steele*, 152 U. S. 133;
Koch v. *Toledo*, 37 F. 2d 336;
Taylor v. *Moore*, 303 Pa. 469.

Confiscation Not Regulation

The third question presented is:

Is such prosecution against such use of house trailers regulation or, rather, confiscation of house trailers under due process, where the avowed purposes of the Building Code is to provide minimum Standards, provisions, and requirements for safe and stable design, construction and

uses of materials in buildings or structures thereafter constructed or altered?

It should be clear what the purpose of a building code is, especially when stated in the State empowering Act, which also gives the purpose of zoning ordinances to make clear the distinction between the two kinds of ordinances. Here there were both kinds. And both had the same definition, only that the zoning ordinance also defined Trailer Camps, as consisting of house trailers. Obviously the zoning ordinances regulate use and occupancy as against building codes, regulating new construction and alteration. We have stated that, except for the non-conforming provision, use of house trailers could conceivably be regulated by a zoning ordinance. But here it is obvious that it was not meant to regulate use of house trailers by the Building Code. It is realized that the Township here just wants to get them out of its boundaries altogether. By defining house trailers as they did in a Building Code, it is no longer a question of whether 30 days toleration is reasonable or not.

Our worthy opponents have argued in the main along that line. They have not cited any building code or zoning ordinance case. The only cases they can cite are ordinances for regulating trailer parks. In this connection it would be well to consider the Michigan cases, by necessity of its heavy manufacturing and use of house trailers, probably the leading authority on use and regulation of house trailers.

We first had the case of *Cady* v. *Detroit*, 289 Mich. 499. Here was a comprehensive ordinance regulating trailer camps, where there was no State authorizing Act on the subject, and limiting use of trailers to 90 days was upheld. This was in 1939. In 1942, we have the *Richards* v. *City of Pontiac* case, in the lower court, being No. 22, 362 in

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the Circuit Court of Oakland County. It is interesting to note how this lower court overruled the *Cady* case. Said the court:

"That prior to the year 1937 both the manufacturer, the public using them and the public in general viewed the trailer coach as a vehicle and living unit suitable, adaptable and useful only for recreational and transient purposes • • • Since the year 1937 both the construction and the use to which the trailer coach is being put has entirely and completely changed • • • It is now a unit in which people may live comfortably without impairment to health in a climate that experiences as many changes, variations and extremes as is found in the State of Michigan • • • Today • • • the trailer coach has become a semi-permanent residence and not a living unit for transients who go from place to place following seasonal work; or living quarters for the hunter and the vacationist as heretofore suggested. The foregoing is borne out by the fact that the Federal Government has recognized the trailer coach 'as a very satisfactory means of housing Defense Workers;' and to that end has purchased approximately 10,000 for semi-permanent dwellings in defense areas. Pontiac is a defense area."

In 1943 the Supreme Court of Michigan confirmed the lower Court opinion. *Richards* v. *City of Pontiac,* 305 Mich. 666. It clearly held that regulation and not abatement is the proper remedy for Municipalities. Then came the case of *Senefsky* v. *Lawler,* 307 Mich. 728, where the Court stated,

"Furthermore, it may be seriously questioned, if, in the *Cady* case we did not overstate the legitimate scope of police power." And this discrediting of the basis for the decision of the *Cady* case was confirmed again in the *Pringle* v. *Shevnock* case, 309 Mich. 179.

The State of Pennsylvania and its subordinate subdivisions might well take a leaf out of the experience of Michigan's development in the regulation of house trailers.

It would appear clear that this Township singled out house trailers to eliminate, just as has been tried in instances where undue burdens were placed at other politically unpopular or vulnerable activities. In *Road Improvement Dist.* v. *Missouri Pacific R. Co.*, 274 U. S. 188, costs of road improvements were disproportionately assessed against railroads. In *Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, a home for the poor was considered undesirable as a residence. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, prejudice fell upon laundries. In *New State Ice Co.* v. *Liebmann*, 285 U. S. 262 opportunity at ordinary labor in the manufacturing of ice was held the entitlement of all.

Here the appellant is entitled to the opportunity to lawfully operate trailers through his business, "Quaker Lodge." Other cases of prejudicial treatment are:

Buchanan v. *Warley*, 245 U. S. 60;
Dobbins v. *Los Angeles*, 195 U. S. 223;
Welch v. *Swasey*, 214 U. S. 91.

House Trailers and Their Use Not Contemplated by State Authorizing Act

Our last question is:

Does an Act authorizing regulations by a Township for approval of building plans and specifications based on classifications of buildings according to the use "to be" of them allow the Township to stop the further use of house trailers already lawfully in existence?

We have already stated that the distinction between the purposes of building codes and zoning ordinances should be clear. The Superior Court of Pennsylvania however chooses not only to disregard this distinction but even holds

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that an amendment to the State authorizing Act for Building Codes authorizes the instant Township to regulate also use and occupancy by its building code.

It is clear that a subordinate political subdivision of a State may only enact the laws specifically authorized by the State. This is strictly construed. *Lower Merion T. W. P.* v. *Harrison,* 84 Pa. Super. Ct. 574. Here the Superior Court held that the Township could not regulate use or occupancy after construction. Now the same Court says that the Township may because "such power was supplied by the Township Code of 1931," pointing out the provision, "to classify buildings or parts of buildings according to the use to be made of them." It is submitted that here was only supplied a classification for the different construction specification purposes, i. e., wall thickness, etc., for single-family as against double-family dwellings, etc. This is further borne out by the last clause of the said Article XVIII, which provides that only where once constructed and change of use which requires more stringent plans and specifications, then and then only to consider use for further classification.

It is also submitted that the said Clause XVIII did not contemplate the inclusion of house trailers. In *Richards* v. *City of Pontiac,* 305 Mich. 666, judicial notice was taken of the fact that a State Building Act of 1917 authorizing building codes did not intend to cover trailers or trailer camps.

The Pennsylvania Superior Courts holding that "these house trailers were not resting on wheels" is not borne by any testimony or the Findings of Fact of Judge Knight of the trial court. "Boxes, or some jacks of some sort" were merely supplementary to their resting on their wheels. And if the said conclusion of the Superior Court is correct, then it merely shows how none of the foundation prerequi-

sites as required by the Township Building Code were met, showing a complete unlawful existence for these trailers, even in their first 30 days of lawful existence. You just can't make fish out of fowl, and vice versa.

The only State definition of trailers is in the State Vehicle Code of 1929, as amended, 75 P. S. 2. There it is defined as a vehicle as it is in the Building Code under question. The only State definition of a "dwelling" is in connection with the 1st Class City Code on Division of Housing and Sanitation, 53 P. S. 3871, where it is defined as a "house or building having no common right or use of any hall, stairway, cellar, water-closet or privy." Certainly house trailers can never meet either the requirements of the instant Building Code definition of a single-family dwelling or of the State definition just quoted.

It is submitted that definitions must bear some relationship to realities; and house trailers cannot in reality be classified with permanent buildings having the usual and present modes of permanent construction.

In *Fidelity Trust Co.* v. *Charles,* 83 P. L. J. 591, it was unsuccessfully attempted to make a pole into a "building."

This is a case of first impression in so far as an attempt to regulate use and occupancy of house trailers by a building code of a municipality is concerned. The only case we have been able to find at all in point is the *Richards* v. *City of Pontiac,* 305 Mich. 666 decision, already cited on pages 18 and 19 of the statement as to jurisdiction, where it was held a State Building law could not be held to cover a trailer camp Ordinance, by the City of Pontiac. We believe that to be good law. Building Codes should have only safety of construction details for the various classifications of homes or factories, etc. And certainly Zoning Ordinances are the means to regulate use and

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occupancy, not building codes. This should hardly need any citation, especially in cases as here, where not only has the State through its authorizing Township Code provided for both Building Codes as well as Zoning Ordinances, but the Township has enacted both kinds of ordinances. Zoning Ordinances generally create use districts and otherwise deal with use and occupancy of buildings.

In addition we have here lawful use of a sizable property for over three years before a building code dealing with future construction permits embodies use of this property, and a further permitted period of three more years before prosecution is started. To us it is rather simple and clear that vested property is thus taken without due process, when such property's operation in fact was not in any way shown to be prejudicial to public health, safety, morals or general welfare.

Respectfully submitted,

G. Harry Ditter,
Meyer L. Casman,
Attorneys for Appellant.

APPENDIX

IN THE SUPERIOR COURT OF PENNSYLVANIA, OCTOBER TERM, 1945

No. 18

TOWNSHIP OF LOWER MERION,

v.

DARWYN GALLUP, *Appellant*

Appeal from Order and Judgment of the Court of Common Pleas of Montgomery County, as of No. 156 November Term, 1943. Filed March 5, 1946.

Opinion by ARNOLD, *J.*

This case involves the validity of a building code ordinance, as it is applied to house trailers.

This Court held in Township of Lower Merion *v.* Harrison, 84 Pa. Superior Ct. 574, that the then legislation [1] did not confer the power to classify buildings according to use and occupancy in a building code, but only to make regulations irrespective of use. Such power was supplied by the Township Code of 1931, P. L. 1206, 53 P. S. 19092-201 et seq.[2] "This control by the building laws and the municipal regulations founded thereon, is basically the same as that imposed by the zoning ordinances . . .": Commonwealth ex rel. Shooster *v.* Devlin, 305 Pa. 440, 445, 158 A. 161.

In 1931 appellee enacted a building code fixing certain minimum requirements relating to light, air, sanitation and safety of buildings thereafter erected. The buildings were

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[1] Act of 1917 P. L. 1115 as amended by Act of 1919 P. L. 424.

[2] "The corporate power . . . shall be vested in the board of township commissioners. The board shall have power . . .

"XVIII. To make regulations for the construction of new buildings and the alteration and repair of old ones, and to require that before the work begins municipal approval of the plans and specifications therefor be secured; *to classify buildings or parts of buildings according to the use to be made of them;* to specify the mode of construction of such different classes of buildings . . ." (Italics supplied.)

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classified according to use, among them dwellings. Penalties were provided for those who built, used or permitted to be used any non-conforming buildings, including dwellings.

The validity of the original Building Code of 1931 is not challenged by the appellant as being invalid or unreasonable in any particular. It is a clear violation of this ordinance to build and use as a dwelling a nonconforming house such as, for instance, the familiar tourist camp cabin. It is no less a violation where the cabin is built without, and then moved into, the township and occupied as a dwelling.

In 1940 the township amended its building code by adding section 200, reading: "House trailer means any vehicle for living or sleeping purposes. If a house trailer is used for living or sleeping purposes within the township for an aggregate of more than thirty days in any period of one year, it shall be considered as a single family dwelling for all purposes of this ordinance."

Admittedly defendant, subsequent to 1940, permitted house trailers to be placed on his ground and to be used and occupied as dwellings, and the identical trailers have remained there and been used as dwellings for several years without interruption. Admittedly they do not conform to the requirements of the building code in a great number of respects, including sanitation and windows. This subjected him to the penalty imposed and from which he appealed.

A house trailer is simply a mobile house. It is as much a dwelling as any house which is built on a foundation and therefore not mobile. Indeed these house trailers were not resting on wheels but where "up on boxes, or some jacks of some sort." Some "from the floor of the trailer to the ground (were) covered around . . . with what appeared . . . to be a shingle, or composition . . . for breaking the wind." Sidewalks leading to each were constructed. Each was connected with water and electric lines. Communal lavatory and laundry facilities were provided by the defendant.

To say that these were not dwelling houses is an attempt to fictionalize a reality. They were used and intended to be used as homes, and were as much dwellings as any simi-

larly sized structure could be. In fact they contained household conveniences rarely present in houses so small. They differed from the ordinary house only in respect to the ease with which they could be moved. They were very similar to the tourist cabins so frequently found along our highways.

The building code is not an attempt to regulate or prohibit a trailer camp, which the appellant contends can only be done under a zoning ordinance. This clearly appears from the clause that the trailer is not to be considered a dwelling until it has remained 30 days. This is a fair standard by which to determine whether the use is temporary and transient, and therefore legal, or settled and fixed, and therefore illegal. If the local government cannot fix a thirty day limit it can as well be argued that no limit can be fixed, which in turn means that permanency cannot be avoided.

In Indiana a thirty day limitation was sustained: Spitler *v.* Town of Munster et al., 14 N. L. 2d 579 (1930); in Ohio a sixty day limitation: Renker *v.* Village of Brooklyn, 40 N. E. 2d 925 (1942); and in Michigan a ninety day limitation: Cady *v.* City of Detroit, 286 N. W. 805 (1939). In each of these cases the power was conferred on the local government. In the cases striking down such provisions such power was not conferred or was in conflict with another statute, as in the later Michigan case of Richards *v.* City of Pontiac, 9 N. W. 2d 885 (1943).[3] The case at bar is one of first impression in Pennsylvania, but is controlled by the principle of local self government having the right to exercise all power conferred.

It is argued that a current house shortage ought to make this restriction void. That might be an argument why the local authorities ought not to enforce the ordinance, but certainly cannot render this judgment invalid. With neither the wisdom of the ordinance nor the rationality of its enforcement have we anything to do. These have been

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[3] See "Automobile, Motor and Tourist Camps" by Charles S. Rhyne, Executive Director of the National Institute of Municipal Law Officers, Report No. 75—Legal and Administrative Problems of Municipal Regulations—for an able discussion of the various problems and respective rights. See also 115 A. L. R. 1400.

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confided by our Constitution, not to the courts, but to the other two coordinate branches of the government. In Commonwealth *v.* Schaffer, 98 Pa. Superior Ct. 265, Judge Baldrige (now President Judge) stated at page 268: "It is our duty, instead of defeating the purpose of an ordinance and vitiating it, to resolve any doubt in regard to its construction in favor of its validity."

Judgment affirmed.

(6118)